STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 11, 2016
v	No. 324500 Livingston Circuit Court
LEONARD LEWIS KING, Defendant-Appellant.	LC Nos. 13-21340-FH; 13-21416-FH

Before: BOONSTRA, P.J., and K. F. KELLY and MURRAY, JJ.

PER CURIUM.

Defendant, Leonard L. King, appeals by right his convictions of home invasion in the second-degree, MCL 750.110a(3), attempted home invasion in the third-degree, MCL 750.110a(4), possession of burglar tools, MCL 750.116, and receiving and concealing stolen property valued between $1,000 and $20,000, MCL 750.535(3)(a). He was sentenced in docket no. 13-021340-FH as a fourth habitual offender, MCL 769.12, to prison terms of (1) 20 to 80 years for possession of burglar tools and (2) 10 to 15 years for attempted home invasion in the third-degree. In docket no. 13-021416-FH, he was sentenced to prison terms of (1) 20 to 80 years for home invasion in the second-degree and (2) 20 to 80 years for receiving or concealing stolen property. All four sentences are to run concurrently.

Defendant argues that his defense counsel performed inadequately, the trial court erred in joining the two cases, that he is entitled to resentencing, and that the prosecution committed error requiring reversal. For the reasons discussed below, we affirm defendant's convictions and remand to the trial court for further sentencing proceedings consistent with this opinion.

Defendant first argues that the trial court improperly denied his motion for a *Ginther*[1] evidentiary hearing to establish that he received the ineffective assistance of counsel. Defendant argues that his trial counsel performed inadequately in numerous ways, which denied him his right to the effective assistance of counsel.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A *Ginther* hearing is only warranted if the defendant is able to show a potentially meritorious ineffective assistance of counsel claim that requires further development of the record. *See People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985) (denying the defendant's request for remand for an evidentiary hearing because he failed to provide an adequate reason for the request). Here, defendant has made no showing that further factual development would benefit his argument. To the contrary, in his affidavits defendant merely relies on legal conclusions that defense counsel's actions "prejudiced" his right to a fair trial. Each of defendant's arguments can, however, be resolved based on the record before this Court. In addition, further factual development would not render these claims meritorious.

To establish a claim of ineffective assistance of counsel "a defendant must show that (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *Trakhtenberg*, 493 Mich at 52. This Court "will not substitute its judgment for that of trial counsel regarding trial strategy, nor assess trial counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant argues that his counsel was deficient for failing to object when the trial court improperly instructed the jury on second-degree home invasion, and that the error prejudiced his right to a fair trial. When reviewing claims of instructional error, this Court considers the instructions as a whole, rather than piecemeal, to determine whether any error occurred. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). A defendant has the right to have all elements of each crime submitted to the jury in a way that is neither erroneous nor misleading. *Id*. However, even "errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id*. (quotation omitted). Rather, an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights. *Id*. at 501-502.

Defendant was convicted of second-degree home invasion, MCL 750.110a(3), which provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.

Defendant argues that he was convicted based on a theory of entering without permission and that the trial court provided the jury with improper instructions when it stated:

> In case number 13-21416, Count 1, the Defendant is charged with home invasion in the second degree. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant broke into a dwelling located at 2447 Spring Grove Drive, Genoa Township, Livingston County, Michigan. It does not matter whether anything was actually broken. However, some force must have been used. . . .
>
> Second, that Defendant entered the dwelling. . . .
>
> Third, that when the Defendant broke and entered the dwelling he intended to commit larceny.

The instructions for home invasion-second degree—breaking and entering, and home invasion-second degree—entering without permission, both fall under Chapter 25 of the criminal jury instructions, generally entitled "Breaking and Entering." CJI 25.2d, the instruction for entering without permission, only differs from the instruction given by the court in that "entered without permission" in the instruction was replaced by "broke into" and "broke and entered" in the court's instruction. In this context, "breaking into" or "breaking and entering" would necessarily include "entering without permission." Because the instruction given was substantially similar to the standard instruction, and encompassed the actions defendant actually committed, this error did not prejudice defendant's right to a fair trial. Thus, although this instruction may have been imperfect, it fairly presented the issues to be tried and adequately protected defendant's rights. *Kowalski*, 489 Mich at 501-502. Defense counsel's failure to object, therefore, did not prejudice defendant's right to a fair trial.

Defendant also argues that he was prejudiced when defense counsel failed to object to testimony that drug users often commit crimes. Generally, "evidence of other crimes, wrongs, or acts 'is inadmissible to prove a propensity to commit such acts.'" *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). However, such evidence may be admissible for other purposes under MRE 404(b)(1), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Admissible other acts evidence is not limited to the exceptions in MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Rather, "other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *Id*.

To determine whether other acts evidence is admissible under MRE 404(b), this Court applies a four-pronged standard:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*VanderVliet*, 444 Mich at 55.]

In this case, the prosecutor offered evidence that defendant was a heroin addict to show that his motivation for committing the crimes was to obtain money to support his addiction, which is a proper purpose under MRE 404(b)(1). *See People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997). The evidence was therefore "probative of a fact other than the defendant's character or criminal propensity." *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010). To prove receiving or concealing stolen property, the prosecutor had to show that defendant intended to permanently deprive the victim of the jewelry. Because evidence of defendant's drug use showed his intent to permanently deprive the owners of their property, the prosecutor satisfied the second admissibility prong of MRE 404(b). *VanderVliet*, 444 Mich at 55.

Defendant's drug addiction was also highly probative of his motive for committing the home invasions, see *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999) (holding that evidence of a defendant's drug use and need for money to purchase drugs was highly relevant to show his motive for committing a crime), and the evidence did not create a danger that the jury would conclude that he had a propensity to commit the home invasions, because drug use and home invasions involve completely different acts. Further, there is no indication that evidence of defendant's drug use injected extraneous considerations such as jury bias, shock, anger, or sympathy. *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). In sum, the drug addiction testimony was admissible under MRE 404(b) and defense counsel was not ineffective for failing to object.[2]

Defendant also provides a lengthy but cursory list of alleged errors by defense counsel. These include assertions that he failed to: (1) demand a speedy trial; (2) require the prosecution to provide defendant with discovery before trial; (3) move for an evidentiary hearing on identification of defendant as the perpetrator; (4) file an alibi notice on defendant's behalf; (5)

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[2] Defendant relies on *People v Williams*, 63 Mich App 389; 234 NW2d 537 (1975), where the defendant attempted to steal a set of socket wrenches from a department store. *Id*. at 390-391. At the outset of trial, defense counsel moved for the suppression of the drug evidence, but the trial court allowed the evidence, reasoning that it could support an inference that the defendant stole to support a drug habit. *Id*. This Court overturned the conviction, noting that the prosecution did not offer any evidence that the defendant had a drug problem and did not establish that the evidence actually related to the defendant's suspected drug use. *Id*. at 393. Notably, the Court did not decide whether "evidence that the defendant was a narcotics addict would be admissible for the purpose of showing a motive for the commission of a crime. . . ." *Id*. at 392 n 1. Unlike in *Williams*, here there was a factual basis, established at trial, for finding that defendant invaded the homes and committed the crimes to support a heroin addiction.

move for suppression of certain jewelry items as evidence; (6) excuse juror 37 who worked in the legal field; (7) call a supporting witness on defendant's behalf; (8) properly interview witnesses and properly investigate defendant's case; and (9) request a cautionary instruction regarding identification of defendant as the perpetrator. None of these rather conclusory allegations provide relief for defendant.

First, defendant has not adequately demonstrated that defense counsel improperly failed to demand a speedy trial. To the contrary, it appears that any delay was the ordinary result of settlement negotiations, witness availability, and scheduling, including defense counsel's availability. Because defendant has wholly failed to support this claim with argument on appeal, he has failed to meet his burden to establish this claim.

Second, assuming that defense counsel did fail to provide defendant with discovery before trial, defendant has failed to explain how this might have affected his right to a fair trial. Defendant does not identify what defense, if any, he was deprived of. Because he has failed to demonstrate that this alleged error may have affected the outcome of his trial, he has failed to meet his burden to show ineffective assistance of counsel.

Third, defense counsel was not ineffective for failing to move for an evidentiary hearing on identification of defendant as the perpetrator. Defendant was arrested near the scene of one crime, while in possession of stolen items from the other. In court, one victim positively identified defendant as the perpetrator. The evidence presented closely linked defendant to the crimes committed. Defendant has failed to demonstrate that an evidentiary hearing could have provided any relevant or useful testimony to support his argument.

Fourth, defense counsel did not err in failing to provide an alibi notice. Defendant claims that he was working on the day of the first home invasion. However, even his wife testified that, while he was working on that day, she did not know whether he was working at the time of the crime. Although defendant claims that video evidence would show he was working, he has failed to provide any such evidence, and has failed to show that this alleged error would have changed the outcome of his trial.

Fifth, defense counsel did not err in failing to move for suppression of the jewelry entered as evidence. The prosecution presented evidence that the jewelry was found on defendant and in his nightstand. Defendant has not identified any basis for suppression of the evidence. The jewelry was highly relevant, and objection to its admittance would have been overruled. Although the prosecution did not show that all the jewelry recovered was stolen, the totality of the circumstances allowed a reasonable inference that it was all stolen. In any event, defendant cannot show that admittance of jewelry that was not stolen affected the outcome of his trial.

Sixth, defense counsel did not err in failing to challenge juror 37, as we referenced earlier, although juror 37 initially stated that she was not sure if she could follow the law, she did not indicate that she was biased toward or against the prosecution. Additionally, juror 37 stated that she would follow the jury instructions to the best of her ability. Defendant failed to show that the juror was biased against him.

Seventh, defense counsel was not ineffective for failing to call Brian Oyster as a witness. The decision to call or question witnesses is presumed to be a matter of trial strategy, and the failure to call or question a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, as in *Dixon*, 263 Mich App at 398, defendant has failed to show that defense counsel's decision not to call Oyster deprived him of a substantial defense. Initially, defendant failed to provide a statement regarding what testimony, if any, Oyster would have provided. For this reason alone, defendant has failed to show that not calling Oyster was an unsound trial strategy. Additionally, defendant indicated in his affidavit that Oyster would have bolstered the testimony of defendant's wife. However, as in *Dixon*, the record shows that defendant actually presented the evidence, through his wife, and that defense counsel bolstered defendant's theory based on her evidence, in closing argument. *Id*. Because defendant's defense and theory of the case were actually raised, this contention is without merit. *Id.*

Eighth, defendant has not demonstrated that defense counsel failed to properly investigate his claims and defenses before trial. Notably, defendant fails to state what, if anything, defense counsel should have uncovered in further investigation. And, defense counsel called witnesses on defendant's behalf, cross-examined witnesses, and attempted to shed doubt on the prosecution's case. Defendant has failed to demonstrate that defense counsel failed to investigate his case.

Ninth, defendant has failed to provide any evidence or argument that would cast doubt on the identification of him as the person who committed the crimes. Because defendant would not have been entitled to a cautionary instruction, defense counsel's failure to request it did not amount to unprofessional error.

Defendant next asserts that he was denied a fair trial when the two cases against him were improperly joined for trial. Whether defendant's charges were so related as to permit joinder is a question of law that this Court reviews de novo. *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977), superseded by court rule on other grounds as stated in *People v Williams*, 483 Mich 226, 228; 769 NW2d 605 (2009). This Court reviews a trial court's ultimate decision to join cases for trial for an abuse of discretion. *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 273; 666 NW2d 231 (2003).

Under MCR 6.120(B)(1), "[j]oinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on[:]"

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan.

The trial court properly determined that the cases against defendant were related under MCR 6.120. *See Williams*, 483 Mich at 234-235. In *Williams*, the Court found that the "defendant was

engaged in a scheme to break down cocaine and package it for distribution." *Id.* at 234. Thus, separate charges were properly joined for one trial where they related to drug evidence found in a motel room and at a house, and both locations were connected to the defendant's drug distribution. *Id.* at 234-235. The Court reasoned that, although the defendant was arrested on two separate dates, direct evidence indicated he was engaging in the same particular conduct on both dates. *Id*. Thus, "the offenses charged were plainly 'related' under MCR 6.120(B)(2)" because the evidence indicated that the defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution. *Id.*

Similarly, in this case the trial court properly found that the cases were sufficiently related to join for trial. The cases involved the same conduct and were necessarily intertwined, as the evidence found on defendant at the time of his arrest in the second case provided direct evidence of his guilt in the first case. Further, at the time of his arrest, defendant possessed tools that the prosecution argued were used in the first crime. For this reason, the prosecution would have sought to enter the evidence of each crime against defendant in both trials, had they been separated, and separating the cases for trial would have been duplicative. In addition, the evidence entered against defendant showed his ongoing acts, which constituted part of his overall scheme to steal from homes and resell the items stolen. The trial court, therefore, did not err in determining that the cases were adequately related for trial, and did not abuse its discretion in joining the cases.

Additionally, the trial court properly instructed the jury that all four counts were separate, and that it should consider them individually. *Williams*, 483 Mich at 234. Juries are presumed to follow the instructions given to them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the trial court properly instructed the jury regarding the separate counts, and defendant has failed to show that any of the evidence against him was improperly entered as to each crime, defendant cannot show that joinder could have prejudiced his right to a fair trial.

Defendant also argues that the trial court erred in exceeding the sentencing guidelines when it sentenced him to a term of imprisonment of 20 to 80 years. In *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), the Court held that Michigan's sentencing system, which required a substantial and compelling reason to depart from the sentencing guidelines, may violate the defendant's Sixth Amendment Rights. As the United States Supreme Court did in *United States v Booker*, 543 US 220, 233; 125 S Ct 738; 160 L Ed 2d 621 (2005), the *Lockridge* Court remedied the violation by rendering the guidelines advisory, rather than mandatory. *Id*. at 391. "[A]lthough the guidelines can no longer be mandatory, they remain a highly relevant consideration in a trial court's exercise of sentencing discretion." *Id.* Thus, trial courts " 'must consult those Guidelines and take them into account when sentencing.' " *Id*., quoting *Booker*, 543 US at 264.

Lockridge held that "[a] sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *Lockridge*, 498 Mich at 392. After *Lockridge*, this Court held that reasonableness should be determined in accord with the

"proportionality" standard first established in *People v Milbourn*.[3] See *People v Steanhouse*, __ Mich App __; __ NW2d __ (2015); slip op at 25 ("the principle of proportionality established under *Milbourn* and its progeny is now the appropriate standard by which a defendant's sentence should be reviewed . . . ."). This Court also stated "that the procedure articulated in *Lockridge*, and modeled on that adopted in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), should apply" on remand for review of sentencing departures. *Id*. In this context, "the purpose of a *Crosby* remand is to determine what effect *Lockridge* would have on the defendant's sentence, so that it may be determined whether any prejudice resulted from the error." *People v Stokes*, __ Mich App __; __ NW2d __ (2015); slip op at 11. Because the *Crosby* procedure "offers a measure of protection to a defendant[,]" "a defendant is provided with an opportunity 'to avoid resentencing by promptly notifying the trial judge that resentencing will not be sought.' " *Id*. at 11-12, quoting *Lockridge*, 498 Mich at 358.

In *Steanhouse*, the trial court departed upward from the minimum guideline range and provided "substantial and compelling reasons" for its upward departure. *Id*. at 21. However, this Court remanded for a *Crosby* hearing to determine whether *Lockridge* would affect the defendant's sentence, and if any prejudice may have resulted. *Id*. at 25; see also *People v Shank*, __ Mich App __; __ NW2d __ (2015) (remanding for a *Crosby* hearing when the trial court departed upwards from the minimum sentence range); and *People v Masroor*, __ Mich App __; __ NW2d __ (2015). Consistent with these opinions, we remand to the trial court for a *Crosby* hearing.

In his Standard 4 brief defendant argues that he was denied a fair trial when a biased juror served on the jury. An unpreserved claim of juror bias is reviewed for plain error affecting the defendant's substantial rights. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). To warrant reversal under this standard, there must have been an error which was plain, meaning clear or obvious. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009). The error must have affected the defendant's substantial rights, which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 197. Additionally, the error must have "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings. . . ." *Id*. (quotations omitted).

As previously noted, although juror 37 initially stated that she was not sure if she could follow the law, she did not indicate that she was biased toward or against the prosecution and after further questioning, she stated that she would follow the jury instructions to the best of her ability. Additionally, before she was empaneled she stated, as did all jurors, that she would follow the court's instructions. Finally, the fact that she asked if the jury could "clap" when an officer entered to testify does not show actual bias against defendant. In context, the comment is ambiguous. Defendant has failed to show that juror 37 was biased against him.

[3] 435 Mich 630; 461 NW2d 1 (1990), superseded as stated in *People v Armisted*, 295 Mich App 32, 811 NW2d 47 (2011).

Finally, also in his Standard 4 brief, defendant argues that the prosecution committed error[4] requiring reversal for making improper arguments to the jury. To preserve a claim of prosecutorial error, the defendant must contemporaneously object to the alleged conduct or request that the trial court give the jury a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the alleged conduct, and did not request a curative instruction. Therefore, defendant failed to preserve this issue for appeal.

This Court reviews unpreserved claims of prosecutorial error for plain error affecting a defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). To warrant reversal under this standard, there must have been an error which was plain, meaning clear or obvious. *Borgne*, 483 Mich at 196-197. The error must have affected the defendant's substantial rights, which "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 196. Additionally, the error must have "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings . . ." *Id*. at 197. (quotations omitted).

Prosecutors are permitted to argue the evidence and make reasonable inferences to support their theory of the case. *People v Christel*, 449 Mich 578, 599-600; 537 NW2d 194 (1995). Prosecutors are accorded wide latitude with regard to their arguments during trial. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

Taking the comments as a whole, the prosecution did not misstate facts and argued reasonable inferences that the jury could make from the evidence presented. Contrary to defendant's argument, the prosecution did not attempt to discredit defense witnesses by showing that they were guilty of a crime, and never explicitly made such an argument. Where defendant's wife and Craig Theunick, with whom defendant was arrested, had previously sold jewelry at the Gold Depot, the prosecution argued that selling jewelry at the Gold Depot could establish a "modus operandi for what was happening here[,]" and that "you can infer from that information intent and knowledge of items being stolen . . ." The prosecution properly submitted this evidence to show opportunity and intent, i.e., that defendant had the ability to resell stolen jewelry and that he knew it was stolen. Because this argument was supported by evidence, the prosecution did not err in arguing this inference.

Nor did the prosecution's reference to Theunick as a "heroin addict" amount to prosecutorial error requiring reversal. The evidence showed that defendant and Theunick used heroin together. After their arrest, the police found drug paraphernalia in the car driven by Theunick, above the driver's seat. The evidence suggested that Theunick was driving the car for defendant while defendant robbed the homes to support their drug habits. Taken as a whole, the evidence supported the prosecution's reasonable inference that Theunick regularly used heroin, and was helping defendant to rob houses to support that habit. The prosecution merely argued reasonable inferences raised by the evidence.

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[4] See *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015).

For the forgoing reasons, we affirm defendant's convictions and remand to the trial court so that it may hold a *Crosby* hearing regarding defendant's sentences. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray